

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM
DEUPREE, SR. AND SUNSHINE K. SNYDER, PETI-
TIONERS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, AND
CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE
DEPARTMENT OF HIGHWAYS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT*

MOTION TO REMAND TO THE DISTRICT COURT

The Secretary of Transportation moves that this Court vacate the judgment of the court of appeals and remand this case to the district court with instructions to vacate the judgment granting respondent's motion for summary judgment for the purpose of enabling the Secretary of Transportation to introduce the entire administrative record on which his decisions were based.

This case was decided by the United States District Court for the Western District of Tennessee on respondents' motion for summary judgment; the record then before the court consisted only of affidavits, and attachments thereto, submitted by all the parties. A divided court of appeals affirmed the grant of summary judgment and denied a petition for rehearing *en banc* and an application for stay. On December 7, 1970, this Court, after hearing oral arguments, granted an application for stay pending issuance of its judgment, and, treating the stay application as a petition for a writ of certiorari, granted certiorari.

On further study of the record before the district court, it is our view that a determination (a) whether the Secretary did in fact make the findings called for in both the Department of Transportation Act of 1966 (49 U.S.C. (Supp. V) 1653(f)) and the Federal-Aid Highway Act of 1968 (23 U.S.C. (Supp. V) 138)), and, if so, (b) whether that determination was in this case arbitrary and capricious, should ^{on the affidavits submitted,} but should have been based not have rested on the administrative record that was before the Secretary at the time of his approval of the route and design of Interstate Route I-40 through Overton Park. Since that administrative record was not before the district court, a definitive decision should not be made by this Court on this record. A remand at this time is appropriate to make it possible to introduce the administrative record for judicial consideration.

The issue whether it was error to refuse petitioners' request to take the Secretary's deposition

will, of course, remain in the case, as will the question concerning the governing standard of review of the Secretary's action. However, these questions should not, in our view, be decided by this Court in the abstract, as would be necessary on the present record, but rather should, if they still exist after remand, be resolved on the basis of concrete facts. It is entirely possible that both issues will become moot on introduction of the administrative record, in that the basis for the Secretary's action might then be made clear and the district court might find that his determination not only meets the arbitrary and capricious test but also is supported by substantial evidence. If such is not the case, application can be made to bring these issues again to this Court, but on a more complete record.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

No. 1066

Responses to motion to
remand, etc., not printed.